REL: July 8, 2022

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-18-1211

Nathaniel Dennis

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-12-163)

COLE, Judge.

Nathaniel Dennis appeals his conviction for murder made capital because it was committed during a burglary, a violation of § 13A-5-40(a)(4), Ala. Code 1975, and his resulting sentence of life imprisonment without the possibility of parole.

Dennis raises five issues on appeal: (1) that he was denied his right to a speedy trial in violation of the Sixth Amendment, (2) that the trial court improperly allowed the admission of an evidence label and forms from the Alabama Department of Forensic Sciences ("ADFS") that, he says, were inadmissible hearsay evidence and admitted in violation of his right to confront witnesses, (3) that the victim's statement was improperly admitted into evidence as a dying declaration, (4) that the victim's death certificate was improperly admitted into evidence, and (5) that the trial court erred in denying Dennis's motion for a judgment of acquittal based upon the State's failure to prove the victim's cause of death.[1]

Facts

The evidence presented at trial established the following: Bruce Henderson, a retired officer with the Dothan Police Department, testified that he was the first officer to the scene of the crime, an Amoco gasoline station, at 11:45 p.m. on the night of September 26, 1981. A window of the gas station was broken out, the store was in "disarray," and Russell

[1]Because Dennis's first argument is dispositive of this appeal, we do not address Dennis's four other arguments.

Douglas was lying on the ground in the doorway. There was "a tremendous amount of blood" at the scene, and Douglas's "shirt was completely covered in blood" with holes in the front and back of the shirt. (R. 362-63, 371.) According to Officer Henderson, Douglas never raised his head or hand and he had difficulty speaking. Before losing consciousness, Douglas "told [Henderson] that a black male had done this, that he was wearing a stocking. And [that] he left running toward 431 in a southerly direction." (R. 369.)

Jackie Mendheim, a retired police officer, testified that in 1981 he was assigned to the criminal-investigation division with the Dothan Police Department. Mendheim identified photographs from the night in question and testified that "the only thing that seemed to be out of place would be the stocking that was hung on the brick wall with a black tuft of hair." (R. 380.)

According to Officer Mendheim, Officers Charlie Brooks, Larry Lynn, and Robert Jenkins were also at the scene with Mendheim, but they were all deceased at the time of the trial. In the early morning hours of September 27, 1981, Officer Mendheim observed Brooks take pictures

and place evidence in evidence bags being held by Mendheim. Brooks would then write a description of the contents on the outside of the bag.

Timothy Douglas ("Timothy"), the son of Russell Douglas, testified that he was 18 years old when the shooting occurred. His father had suffered a gunshot wound in the back of the neck that exited the left side of his chest. Over Dennis's Confrontation Clause objection, Russell Douglas's certificate of death was admitted into evidence. Timothy testified that his father "never recovered" from the incident and "succumbed" to the gunshot wound after he "went into shock" and his organs "shut down." (R. 428, 430.) Russell Douglas passed away on October 8, 1981. Douglas's medical records were also admitted into evidence.

Ray Owens, a former employee of the Dothan Police Department, testified that on June 24, 1996, he investigated Douglas's "cold case." He went to the evidence vault and obtained a box of evidence that had been collected from the murder that occurred in 1981. Craig Bailey, an ADFS employee for 37 years, examined some of the items for DNA analysis at Owens's request. Bailey testified that he examined the items submitted

to him and concluded that the hair samples were insufficient to do further testing.

William Joseph Lee, a forensic scientist with the ADFS in the Montgomery Regional Laboratory, testified that in 2010 Becky Edwards, with the Dothan Police Department, submitted a sealed envelope containing a stocking with hairs and folded papers with additional hairs. Although they were unable to generate a DNA profile from any of the hairs found in the stocking, there were two hairs found in the second manilla envelope, marked as State's Exhibit 8 and labeled as "hair from stocking," from which he was able to generate a DNA profile suitable for comparison. (R. 507-09.) He entered the DNA profile of the two hairs into the national database of DNA profiles, otherwise known as the "CODIS" system, and he was subsequently notified that there was a "hit" or a match "from one of the hairs to Nathaniel Dennis." (R. 510-512.) Investigators then traveled to Virginia, where Dennis was serving a life sentence on an unrelated charge, to obtain a sample from Dennis. The DNA profile from the two hairs matched the DNA profile of the known sample taken from Dennis. In 2013, Lee obtained the other exhibits and examined "upwards of 200 hairs" and he attempted to test some of those

hairs, but he was able to obtain a DNA profile on only one of those hairs. That hair, which was from Exhibit 8 and was "a hair from the stocking," also matched Dennis's DNA profile. None of the DNA tests excluded Dennis. (R. 522-24.)

After the State rested and Dennis's motion for a judgment of acquittal was denied, Doris Faine testified for the defense that she worked with Dennis at a nightclub called Free World in September of 1981. She and Dennis worked on Saturday nights typically from 8:00 p.m. until 2:00 a.m. Saturday nights were busy and she did not know the wait staff, which included Dennis, to "ever leave in the middle of a Saturday night shift." (R. 589-90.) She remembered that she worked on the night of September 26, 1981.

Agatha Acree Lloyd and Frank Lloyd gave similar testimony that they worked with Dennis at Free World club in 1981. They worked on Saturday nights starting at 8:00 p.m. or 9:00 p.m. and worked past midnight and as late as 3:00 a.m. They did not ever leave the club in the middle of their shift, and they did not recall any other waiters leaving during their shift on a Saturday night.

T.J. Austin then testified that in 1981 he was the president and co-owner of Free World Enterprises. In 1981, Faine, Acree, Lloyd, and Dennis worked at the nightclub. Austin does not recall Dennis missing a Saturday night shift or "slipping away in the middle of a Saturday night shift." (R. 628-29.) Waiters could not have left the club without Austin and a lot of people noticing them leave. Mary Floyd, Marie Johnson, and James Vickers also worked at the nightclub in 1981, but they are now deceased. Austin could not answer whether they died between 2010 and the trial.

After all testimony was closed, the jury returned a verdict finding Dennis not guilty of capital murder to the charge outlined in Count One of the indictment, but it found him "guilty of capital murder during a burglary in the second degree as charged in [Count Two of] the indictment." (R. 815.) After the penalty phase was conducted, the jury recommended a sentence of life imprisonment without the possibility of parole. (R. 935.) At the judicial-sentencing phase, the trial court accepted the jury's recommendation and imposed a sentence of life in prison without the possibility of parole. (R. 974.) This appeal follows.

Procedural History

The first issue raised by Dennis, and the only issue to be addressed by this Court, is whether Dennis was denied his right to a speedy trial in violation of the Sixth Amendment to the United States Constitution. A detailed procedural history of the case is needed to address this issue. Although the offense in question occurred on September 26, 1981, Dennis was not developed as a suspect until 2010 or 2011, when hairs that had been obtained from the scene of the crime were retested for DNA and submitted to a national database, which resulted in a "match" to Dennis. On May 4, 2011, the Houston County Grand Jury indicted Dennis on two counts of capital murder. (C. 16.) At the time of his indictment, Dennis was in custody in Virginia serving a life sentence for an unrelated charge. (Dennis's brief, p. 5). He was transferred to the Houston County jail on January 25, 2012. (C. 19.) The case was initially assigned to Judge Brady Mendheim. On January 26, 2012, Dennis filed a motion seeking Judge Mendheim's recusal based upon Judge Mendheim's relationship to an investigator in the case. That motion was granted, over the State's objection, on May 8, 2012.

The case was reassigned to a circuit-court judge who presided over pretrial matters for almost seven years. (C. 96.) On August 13, 2013, a status conference was held and Dennis was given 60 days to file pretrial motions. At this hearing, the trial court indicated that the case could be set for "a preliminary trial date setting some time in the Fall of 2014," but he also explained that he had a full docket with six capital-murder cases that would prevent the case from going to trial earlier. (R2. 4.)[2]

On August 20, 2013, Dennis filed a document styled as the "Defendant's Assertion of Speedy Trial Right and Motion to Set a Trial Date." In this motion, Dennis stated that he "would prefer that this case be set for trial immediately," but he requested a trial date "by February 2014" to allow time for a pretrial hearing and briefs. (C. 100.) He also asserted that this was a "cold" case from 1981 with elderly witnesses, that a likely mitigation witness had died since the offense occurred, and that other witnesses could die before the anticipated trial date in 2014.

[2] The reporter's transcript of the record on appeal assigns overlapping page numbers to the transcripts of several pretrial hearing and to all proceedings conducted after 2015, including Dennis's trial. In this opinion, "R2" refers to the transcript of the hearing held on August 13, 2013, and "R" refers to the transcript of all proceedings that occurred after November 2, 2015.

(C. 102.) On October 15, 2013, Dennis filed a Motion for Pretrial Hearing requesting that the trial court "hold as soon as possible a pretrial hearing to determine the admissibility of evidence relating to hairs subjected to DNA testing in 2010." (C. 138-40.) On October 18, 2013, Dennis filed a motion to specially set a pretrial hearing to determine the admissibility of DNA evidence. (C. 400.) The case was set for a pretrial hearing on November 25, 2013. The State filed a motion to continue this hearing based on the need for additional time to prepare and due to other conflicts. (C. 405.) This motion was denied after Dennis filed two objections to the State's motion to continue. (C. 406, 408.) At the pretrial-motion hearing on November 25, 2013, Dennis's motion to inspect physical evidence was granted, with a caution from the trial court that testing should not be delayed because the testing could be time consuming. The trial court also indicated that it would not be able to reach the case for trial until 2015, at the earliest. At this hearing, the court indicated that it would grant Dennis's motion for a pretrial hearing to suppress and/or to determine the admissibility of DNA evidence, but a date for that hearing was not set at that time. In a "Status Report" filed

by Dennis on April 27, 2015, Dennis listed his "Motion for a Speedy Trial" in his list of "outstanding motions." (C. 433-34.)

The circuit court set an evidentiary hearing on the pending motion to suppress on September 16, 2015, and it ordered the parties to exchange witness and exhibit lists 14 days before the hearing and to file briefs within 30 days after the evidentiary hearing. (C. 436.) After the State provided Dennis with an exhibit list and a witness list, Dennis filed a lengthy response and a motion in limine asserting that the lists provided by the State were "overbroad" and allegedly contained extensive inadmissible evidence that was irrelevant to the suppression issue to be heard at the hearing. (C. 447-95.) Dennis requested that the State be required to provide appropriate lists by the original deadline of September 2, 2015, but the State filed a motion to continue the evidentiary hearing. (C. 497.) Dennis filed a response stating that, without waiving his right to a speedy trial, he did not object to a continuance of the hearing and that he did not oppose the State having until September 10, 2015, to file the appropriate witness and exhibit lists. (C. 498.) In this response, Dennis referenced the trial court to the speedy-trial issue as follows: "See Def.'s Assertion of Speedy Trial Right &

Motion to Set a Trial Date (filed August 20, 2013). It has now been almost four and a half years since Mr. Dennis's indictment, and Mr. Dennis is eager to bring this dispositive issue before the Court as soon as possible." (C. 508.) The State's motion to continue was granted, but the trial court's order stated that this would "be the last continuance of this hearing." (C. 500.) Dennis's subsequent Motion to Set Hearing, which was filed on September 18, 2015, suggested a new hearing date on October 19, 2015, which was approximately one month after the original hearing date, but the State notified the circuit court and opposing counsel of a conflict on that date. The parties then agreed to reset the evidentiary hearing on November 2, 2015. (C. 511, 514, 516.) In a motion filed on October 20, 2015, Dennis noted that the State had not filed its amended lists of witnesses and exhibits in time to prepare for the hearing but stated that "there should not be another continuance" and that he had "been waiting nearly half a decade to present th[e] dispositive" suppression issue. (C. 522-24.) The suppression hearing was held on November 2, 2015, and the parties were ordered to file findings of fact and law within 30 days of completion of the hearing transcript. The transcript was complete on January 6, 2016, and Dennis filed his brief on February 5, 2016. (C. 542.)

When the State had not filed a brief within 30 days of completion of the transcript, the trial court entered an order on February 10, 2016, giving the State 60 additional days to file a response. (C. 699.) On April 4, 2016, the State requested a seven-day enlargement because of scheduled depositions in an unrelated case. This request was granted, and on April 18, 2016, the State filed a lengthy "Response to Defendant's Proposed Findings of Fact." (C. 708-78.) Later the same day, Dennis filed a "Summary of Principal Cases Cited" on the same subject, but the following day requested 30 days to file a reply to the State's response. (C. 779-88.) The trial court gave Dennis 60 days to file a reply, and Dennis filed a reply and an "Amended Summary of Principal Cases" on June 20, 2016. (C. 790-99, 800-12.) Dennis's motion to suppress was denied approximately nine months later on March 13, 2017. (C. 813.)

Without any further pleadings being filed, the trial court entered an order on August 30, 2017, setting the case for its initial trial setting on June 11, 2018. (C. 814.) On February 27, 2018, Dennis filed a motion for specific discovery alleging that he expected the State's evidence would attempt to show that the attacker and the victim struggled and that the victim pulled a stocking and some hair from the attacker's head. Dennis

requested any information related to an alternative suspect, Raymond Koonce, which he asserted would "be favorable to Dennis" and would "bear[] on the thoroughness of the police investigation in this case." (C. 816.) On May 31, 2018, seven years after Dennis was indicted and more than eight years after hairs were submitted for successful DNA testing in January 2010, the State filed a Motion to Continue on the grounds that the Dothan Police Department had additional "forensic evidence which [had not been tested that] requires DNA testing." (C. 882.) The same day Dennis filed an "Opposition to State's Request for Continuance," which stated, in part, that, "[i]f after seven years to prepare its case the State cannot be ready for trial in this matter before June 11, the State -- or this Court -- should dismiss the indictment with prejudice." (C. 879.) The trial court ordered the State to respond, and the State asserted that in 2018 it had tried two other capital-murder cases and had prepared two others for trial with one of the cases settling on the eve of trial. The State further asserted that the requested DNA tests could produce exculpatory evidence for Dennis and that he would not be prejudiced by further delay because, in part, he was "serving a sentence of over six hundred years in Virginia." (C. 885-86.) On June 1, 2018, less than three hours after the

State's response was filed, the trial court entered an order granting the State's motion to continue. This order was entered approximately three hours before Dennis filed a letter with the trial court that included additional authority to support his position "that any further delay at this point would constitute an extreme violation of the Sixth Amendment." (C. 820-62.)

The State's response to Dennis's objection to a continuance offered to "work with the defense to schedule depositions for any salient witnesses the defense deems necessary based on the availability or possible unavailability of said witness(es)." (C. 886.) While asserting that he was not "waiv[ing] any part of his continuing objection that he has been denied a speedy trial," Dennis did not object to taking pretrial depositions, and 10 depositions were taken by the State and by Dennis on July 30 and 31, 2018. (C. 907, 914.)

On "August 2, 2018, Dennis filed a Petition for Writ of Habeas Corpus ... seeking dismissal of all charges because of the violation of his constitutional right to a speedy trial." (C. 929.) On September 25, 2018, after a hearing on the petition, the trial court denied Dennis's request for

relief. (C. 929.) On October 30, 2018, the trial court set this case for trial on March 14, 2019. (C. 917.)

For reasons not fully outlined in the record, the case was subsequently assigned to Judge John Steensland III, but Judge Steensland entered an order of recusal on January 30, 2019. (C. 918.) Judge Larry K. Anderson was assigned to preside over this case on March 6, 2019, and the March trial date was changed to a "status hearing." (C. 919-20.) On March 14, 2019, the new trial-court judge entered an order setting a status conference on May 9, 2019, and setting the case for trial for "the June 2019 criminal jury term." (C. 921.)

On April 30, 2019, Dennis filed a "Renewed Assertion of Speedy Trial Right and Motion to Dismiss for Speedy Trial Violation." (C. 924-1261.) On May 16, 2019, the State filed a response to Dennis's motion to dismiss based on speedy-trial grounds. (C. 1414-23.) The case proceeded to trial on June 10, 2019, but before the jury was struck and sworn the trial court denied Dennis's motion to dismiss for lack of speedy trial. (R. 153.)

Discussion

As both parties recognize:

> "[i]n determining whether a defendant has been denied his or her constitutional right to a speedy trial, we apply the test established by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which considers the following factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice to the defendant."

State v. Pylant, 214 So. 3d 392, 394-95 (Ala. Crim. App. 2016). The Alabama Supreme Court has stated that "'[a] single factor is not necessarily determinative, because this is a "balancing test, in which the conduct of both the prosecution and the defense are weighed."' Ex parte Clopton, 656 So. 2d [1243,] 1245 [(Ala. 1985)] (quoting Barker, 407 U.S. at 530)." Ex parte Walker, 928 So. 2d 259, 263 (Ala. 2005).

Before weighing the relevant factors to determine whether Dennis was denied his right to a speedy trial, we note that the trial court's ruling on the speedy-trial issue did not include an analysis of the Barker factors. Although this Court has remanded other cases to require the trial court to affirmatively weigh the required factors, see, e.g., State v. Tolliver, 171 So. 3d 94 (Ala. Crim. App. 2014), both parties agree on appeal that such a remand is not necessary in this case, and this Court agrees with the parties. As noted above, the delay in this case was approximately eight years. The record on appeal includes hundreds of pages of motions and

hearings in which the parties addressed the speedy-trial issue. The parties also pointed out during oral argument before this Court that the circuit-court judge who presided over Dennis's trial, and who made the final ruling on his motion to dismiss, had recently been assigned to handle the case and had presided over the case for only approximately three months when the case went to trial. (C. 919.) The trial court's denial of the "motion to dismiss [f]or lack of speedy trial" even indicated that the judge then handling the case did not know if a written speedy-trial motion had been filed. (R. 153.) The parties are correct in asserting that, under the unique procedural history of this case, this Court is in a proper position to decide the speedy-trial issue without remanding the case to the trial court.

The first Barker factor to be considered is the length of the delay. "'In Alabama, "[t]he length of delay is measured from the date of the indictment or the date of the issuance of an arrest warrant -- whichever is earlier -- to the date of the trial."'" Knight v. State, 300 So. 3d 76, 122 (Ala. Crim. App. 2018) (quoting Walker, 928 So. 2d at 264, quoting in turn Roberson v. State, 864 So. 2d 379, 394 (Ala. Crim. App. 2002)). Although almost 30 years passed between the commission of the offense

and the return of Dennis's indictment, that passage of time is not considered in this Court's calculation of the length of the delay. Therefore, the delay in this case, from the return of the indictment on May 4, 2011, until the beginning of Dennis's trial on June 10, 2019, was approximately eight years and one month. As the State acknowledges, delays much shorter than the delay in this case have been held to be presumptively prejudicial thereby requiring consideration of the final three Barker factors. See, e.g., Lofton v. State, 869 So. 2d 533 (Ala. Crim. App. 2002) (41-month delay is presumptively prejudicial and warrants consideration of other Barker factors), and Ex parte Hamilton, 970 So. 2d 285, 288 (Ala. Crim. App. 2006) (29-month delay is presumptively prejudicial). Consequently, this Court will consider the remaining Barker factors.

The second Barker factor, the reason for the delay, has been divided into three different categories by courts addressing this issue:

> "The State has the burden of justifying the delay. See Barker, 407 U.S. at 531, 92 S. Ct. 2182; Steeley v. City of Gadsden, 533 So. 2d 671, 680 (Ala. Crim. App. 1988). Barker recognizes three categories of reasons for delay: (1) deliberate delay, (2) negligent delay, and (3) justified delay. 407 U.S. at 531, 92 S. Ct. 2182. Courts assign different weight to different reasons for delay. Deliberate delay is 'weighted heavily' against the State. 407 U.S. at 531, 92 S. Ct. 2182. Deliberate

> delay includes an 'attempt to delay the trial in order to hamper the defense' or '"to gain some tactical advantage over (defendants) or to harass them."' 407 U.S. at 531 & n. 32, 92 S. Ct. 2182 (quoting United States v. Marion, 404 U.S. 307, 325, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971)). Negligent delay is weighted less heavily against the State than is deliberate delay. Barker, 407 U.S. at 531, 92 S. Ct. 2182; Ex parte Carrell, 565 So. 2d [104], 108 [(Ala. 1990]. Justified delay -- which includes such occurrences as missing witnesses or delay for which the defendant is primarily responsible -- is not weighted against the State. Barker, 407 U.S. at 531, 92 S. Ct. 2182; Zumbado v. State, 615 So. 2d 1223, 1234 (Ala. Crim. App. 1993) ('"Delays occasioned by the defendant or on his behalf are excluded from the length of the delay and are heavily counted against the defendant in applying the balancing test of Barker."') (quoting McCallum v. State, 407 So. 2d 865, 868 (Ala. Crim. App. 1981))."

Walker, 928 So. 2d at 265.

Although Dennis does not allege that the State was deliberate in causing the delay in this case, he argues that approximately half of the delay was negligent while the remaining delay was "between negligent and deliberate." (Dennis's brief, p. 34.) The delay in this case can be divided into eight different time frames, each with different reasons for the delay:

> (1) From May 4, 2011, when Dennis was indicted, until January 25, 2012, when he was transferred from prison in Virginia to Houston County to face the capital-murder charge. Although the record on appeal does not reflect why it took nine months to return Dennis from Virginia, it is noted that the Alabama Uniform

Mandatory Disposition of Detainers Act, § 15-9-81, Ala. Code 1975, which was not triggered in this case, requires that an accused in another state, with some exceptions, shall be transferred to Alabama and "brought to trial within 180 days after he" files the appropriate paperwork with the prosecuting authority. The reason for the delay in merely transferring Dennis to Alabama is unknown to this Court.

(2) From January 25, 2012, until August 20, 2013, when Dennis filed his first motion for a speedy trial and requested a trial date. During this time, one judge recused himself from the case and the second judge set motion deadlines and ordered at least one status conference in the case. This 17-month period involved ordinary procedural occurrences in a case of this nature and this delay was justified or, at worst, negligent.

(3) From August 20, 2013, until September 16, 2015, when this case was originally set for a suppression hearing. Although Dennis requested, in a motion filed on August 20, 2013, that his case be set for trial by February 2014, this motion was filed after learning at a status conference that the trial court expected that its busy docket would prevent the case from being set for trial until at least the fall of 2014. On September 13, 2013, after the State failed to respond to Dennis's speedy-trial motion and his request to set the case for a February 2014 trial date, Dennis filed a "Motion to Deem Unopposed Its Motion to Set a Trial Date" in February 2014, and the trial court granted the request to deem the motion unopposed and stated that the "Court will set Final Hearing in the immediate future." (C. 107 (emphasis added).)

At a pretrial motion hearing in November 2013, the trial court indicated that the earliest possible trial date would be in 2015, and the trial court granted

Dennis's request, which was filed on October 15, 2013, for a pretrial suppression hearing to determine the admissibility of DNA evidence. Although a proposed order was submitted for the trial court to set the motion for a hearing, no order was entered setting the motion for a hearing until Dennis filed a motion and a proposed order setting the case for a pretrial hearing on the admissibility of DNA evidence about a year and a half later on April 27, 2015. (C. 435, 436.) The hearing date was initially set for September 16, 2015. This hearing date was almost two years after Dennis filed his motion to determine the admission of DNA evidence, which was also referred to as a motion to suppress. When the suppression motion was filed by Dennis in November 2013, the trial court had already stated that the trial would not be held until 2015; therefore, a timely pretrial resolution of Dennis's suppression motion would not have delayed the anticipated trial date of 2015. Thus, this period was partially justified, but a majority of this two-year delay should be regarded as negligent delay due to the trial court's failure to set the hearing within a reasonable time after the motion contesting the admissibility of DNA evidence was filed.

(4) From September 16, 2015, until November 2, 2015, when the DNA suppression hearing was eventually held. This seven-week delay was caused by the State's failure to meet the trial court's deadline for producing certain documents in preparation for the suppression hearing. Although not deliberate delay, this delay weighs against the State as a negligent delay.

(5) From November 2, 2015, until February 5, 2016. This period was the time given to both parties to file briefs in support of their position on the DNA suppression issue. Although this was a reasonable time to allow Dennis and the State to file the necessary arguments, the due date was well over two years after the suppression

motion had been filed. Again, this delay weighs against the State as a delay occasioned by the trial court's failure to resolve the suppression issue within a reasonable time after the motion was filed. The State, including the trial court, has the responsibility to assure that the case is brought to trial in a timely manner, not Dennis.

(6) From February 5, 2016, until April 18, 2016. Both parties were ordered to turn in briefs by February 5, 2016. Dennis complied with the trial court's order, but the State failed to file a brief as ordered. The trial court gave the State 60 extra days, then granted the State's motion for 7 additional days. This 10-week delay was clearly negligent delay by the State and weighs against the State.

(7) From April 18, 2016, until the first trial setting on June 11, 2018. Neither the State nor Dennis contributed to this delay. Motions were filed and a ruling denying Dennis's motion to suppress, which would have been dispositive of the case if Dennis had obtained a favorable ruling, was entered during this period. The order setting the trial date in June 2018 was entered on August 30, 2017. At least one year of this delay, in particular after the trial court denied Dennis's motion to suppress on March 13, 2017, was attributable to the trial court and weighs against the State, but not as heavily as the delays caused by the State's action or lack of preparedness.

(8) From June 11, 2018, until the case went to trial on June 10, 2019. This delay is also attributable to the State. Before the original June 11, 2018, trial setting, the State filed a motion to continue to allow the State to do additional DNA testing. The State asserted that the tests could be beneficial to the defense, but Dennis objected to this request for a continuance. The trial

> court granted the State's motion to continue, and the case did not proceed to trial until a year later. Although the State asserted that the new DNA tests could result in exculpatory evidence for Dennis, it is also clear that the State could have obtained a tactical advantage if the tests had further implicated Dennis. This Court finds that this final delay was not a bad-faith delay, but the State was exceedingly negligent in failing to have the tests performed years earlier. Although this final delay weighs heavily against the State, it is mitigated by the State's offer, which was accepted by Dennis, to depose any witnesses that Dennis requested while the additional DNA testing was being conducted. As previously noted, 10 witnesses were deposed in July 2018, approximately 11 months before Dennis's trial began. Yet, it is also "clear that a defendant should not be required to divulge prematurely evidence on the intimate aspects of the defense's trial strategy." State v. White, 962 So. 2d 897, 904 (Ala. Crim. App. 2006). As Dennis providently stated in his "Assertion of Speedy Trial Right" filed almost six years before his case went to trial: "Depositions are not a valid alternative to protect Mr. Dennis's ability to present a case at trial because they necessarily require premature disclosure of trial strategy and thereby prejudice Mr. Dennis." (C. 102.)

"We note that the Barker court also stated that the complexity of the case has a bearing on whether the length of the delay was reasonable." Turner v. State, 924 So. 2d 737, 748 (Ala. Crim. App. 2002). A capital-murder case such as this case will by necessity involve certain delays. Yet, this case did not involve delays in obtaining experts by the defense for the guilt phase or the penalty phase. The trial of this case

was relatively simple. The opening statements and the State's entire case was presented to the jury in one day. The defense rested after presenting a half a day of testimony. The jury deliberated longer than it took to conduct voir dire and to present all the evidence. The jury's guilty verdict was based almost entirely upon testimony that DNA evidence found at the scene of the murder matched Dennis and from the victim's dying declaration testified to by an officer at the scene. Although the charge was very serious, the nature of the case did not require excessive delays in preparing the case for trial. Considering all evidence presented and legal considerations, the reason-for-the-delay factor clearly weighs against the State.

The third factor that must be weighed is Dennis's assertion of his right to a speedy trial.

> "'An accused does not waive the right to a speedy trial simply by failing to assert it. Barker, 407 U.S. at 528. Even so, courts applying the Barker factors are to consider in the weighing process whether and when the accused asserts the right to a speedy trial, 407 U.S. at 528-29, and not every assertion of the right to a speedy trial is weighted equally. Compare Kelley v. State, 568 So. 2d 405, 410 (Ala. Crim. App. 1990) ("Repeated requests for a speedy trial weigh heavily in favor of an accused."), with Clancy v. State, 886 So. 2d 166, 172 (Ala. Crim. App. 2003) (weighting third factor against an accused who asserted his right to a speedy trial two weeks before trial ...).'"

Brown v. State, 74 So. 3d 984, 1013-14 (Ala. Crim. App. 2010).

Dennis first asserted his right to a speedy trial approximately 27 months after he was indicted and 20 months after he was initially represented by counsel of record. This assertion was filed in a document titled "Defendant's Assertion of Speedy Trial Right and Motion to Set a Trial Date" on August 20, 2013, only one week after the trial court informed Dennis that the case would not go to trial for approximately a year. In this motion, Dennis asserted that his right to a speedy trial was "being actively violated" and requested a trial date by February 2014. (C. 100.) He also asserted that one mitigation witness had already died and that a "3-5 year delay in bringing this capital case to trial poses a serious risk of prejudicing Mr. Dennis's case, resulting in a violation of his constitutional speedy trial rights and possibly necessitating a dismissal of the charges against him." (C. 100.) The trial court ordered that the State "respond within 14 days" (C. 104), but it does not appear that the State ever responded to Dennis's initial speedy-trial motion. Dennis noted this failure in a motion filed on September 18, 2013, and asserted that his request to set the case for trial in February 2014 was "unopposed" and should be granted. (C. 105.) In a motion filed on

October 15, 2013, Dennis requested that a pretrial hearing to determine the admissibility of DNA evidence be set "as soon as possible." In a "Status Report" filed by Dennis on April 27, 2015, Dennis notified the trial court, among other things, that his "Motion for Speedy Trial" was still outstanding. (C. 434.) In a motion filed on October 20, 2015, Dennis asserted that "there should not be another continuance" of a suppression hearing and that he had "been waiting nearly half a decade to present" the suppression issue. On May 31, 2018, the State filed a motion to continue the June 2018 trial setting, and Dennis immediately filed an "Opposition to State's Request for Continuance" and alleged that if seven years was not enough time for the State to prepare its case for trial that the State or the trial court "should dismiss the indictment with prejudice." (C. 879.) A few hours after the State's motion to continue was granted, Dennis filed a letter with additional authority to support his argument that "any further delay at this point would constitute an extreme violation of the Sixth Amendment." (C. 820-62.)

On August 2, 2018, Dennis filed a petition for writ of habeas corpus. In the hearing on that petition, Dennis argued that his case should be

dismissed because he had been denied his right to a speedy trial.[3] (C. 1235.) Finally, on April 30, 2019, Dennis filed a "Renewed Assertion of Speedy Trial Right and Motion to Dismiss for Speedy Trial Violation." (C. 924-1261.) This final motion was denied by the trial court the week of trial, but before testimony began. Therefore, considering the May 2018 and June 2018 filings to be two parts of one assertion, Dennis asserted his right to a speedy trial at least five separate occasions during approximately eight years waiting for trial. In addition to these five assertions of his right to a speedy trial, two motions, filed approximately two years apart, argued that the suppression hearing, not the trial, should be "set as soon as possible" and that the hearing should not be delayed.

In sum, Dennis waited approximately 27 months to make his first assertion of his right to a speedy trial, but less than 20 months after Dennis's first attorney entered a notice of appearance and only one week

[3]Dennis appealed the trial court's denial of this petition for a writ of habeas corpus, but the appeal was dismissed because Dennis had already been convicted of capital murder and an appeal of his conviction had been filed. This Court, in an unpublished memorandum, held that the direct appeal of his conviction was the "proper forum for this Court to address the merits of his speedy-trial claim." Dennis v. State (No. CR-18-0139, Nov. 13, 2019), 313 So. 3d 6 (Ala. Crim. App. 2019) (table).

after the trial court announced that the case would not go to trial for at least another year. This first speedy-trial motion requested a trial date by February 2014. His second assertion of his right to a speedy trial, filed approximately 21 months later and 48 months after Dennis's arrest, was a notice to the trial court that the speedy-trial issue was still outstanding. His third assertion of his right to a speedy trial, which was preceded by two written requests for a rapid suppression hearing to resolve a potentially dispositive issue, was made seven years after his indictment and slightly less than five years after his first assertion of his right to a speedy trial. Dennis's third, fourth, and final assertion of his right to a speedy trial were filed within approximately one year of his eventual trial date. Two were filed after the parties began taking depositions to preserve testimony for trial. With multiple requests for a speedy trial, the first of which was filed almost six years before Dennis's trial date, the assertion-of-his-right-to-a-speedy-trial factor weighs heavily in Dennis's favor.

The final factor to be considered under Barker is the prejudice suffered by Dennis. The first question that must be answered is whether Dennis suffered actual prejudice by the delay. In Smith v. Hooey, 393

U.S. 374, 377-78 (1969) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)), the United States Supreme Court discussed an individual's right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution, and stated:

> "[T]his constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: '(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself.'"

Application of these three categories of prejudice to Dennis's case indicates that Dennis has experienced minimal actual prejudice. First, he was incarcerated during the entire eight years pending trial, but he acknowledges that he would have been in prison in Virginia if he had not been in custody in Alabama. Also, any hope of receiving concurrent sentences to finish his incarceration sooner is moot considering that Dennis was ordered to serve a sentence of life imprisonment without the possibility of parole on this case and he was also ordered to serve a 600-year sentence in Virginia. Although Dennis argues on appeal, as he did at the trial level, that serving time in jail pending the trial of this case is more difficult and prejudicial than serving a prison sentence, no evidence

was presented to the trial court to establish that Dennis suffered more by serving time pending trial in an Alabama jail than he would have suffered if he had been serving that time in a Virginia prison. Second, Dennis did not present specific evidence to show how he was prejudiced by suffering from great "anxiety and concern" regarding the pending disposition of the charge. Finally, Dennis asserts that "[a]t least four witnesses Dennis would have called in his defense passed away before he faced trial." (Dennis's brief, p. 49.) Although one of Dennis's witnesses at trial did identify a co-owner of the nightclub and three nightclub employees that died between the night of the murder and the time of trial, that witness was unable to testify when these individuals died. Thus, the witnesses that allegedly would have helped Dennis could have died years before he was ever charged with the murder that occurred in 1981. Furthermore, Dennis did not make any proffer to establish how the four individuals in question could have assisted his defense if the case had gone to trial earlier and if they had been able to testify. Thus, Dennis did not establish that he suffered significant actual prejudice by the eight-year delay.

Even in the absence of specific proof of actual prejudice, prejudice can be presumed in circumstances when the delay is excessive.

> "'The United States Supreme Court in Doggett [v. United States, 505 U.S. 647 (1992),] used three hypothetical cases to demonstrate the accused's burden under the fourth Barker factor. The accused's burden "of proof in each situation varies inversely with the [State]'s degree of culpability for the delay." In the first scenario, where the state pursues the accused "with reasonable diligence," the delay -- however long -- generally is excused unless the accused demonstrates "specific prejudice to his defense." Thus, when the state acts with reasonable diligence in bringing the defendant to trial, the defendant has the burden of proving prejudice caused by the delay.
>
> "'The second situation recognized in Doggett involves bad-faith efforts by the state to delay the defendant's trial. For example, intentional delay by the state in order "to gain some impermissible advantage at trial" weighs heavily against the state, and a bad-faith delay the length of the delay in Doggett likely will "present an overwhelming case for dismissal." Obviously, the burden on the accused to establish prejudice in this scenario would be minimal at most, and depending on how heavily the other Barker factors weigh against the state, the fourth factor's inquiry into prejudice could be rendered irrelevant....
>
> "'The third scenario recognized in Doggett involves delay caused by the state's "official negligence." Official negligence "occupies the middle ground" between bad-faith delay and diligent prosecution. In evaluating and weighing negligent delay, the court must "determine what portion of the delay is attributable to the [State]'s negligence and whether this negligent delay is of such a duration that prejudice to the defendant should be presumed. The weight assigned to negligent delay "increases as the length of the

> delay increases." Negligent delay may be so lengthy -- or the first three Barker factors may weigh so heavily in the accused's favor -- that the accused becomes entitled to a finding of presumed prejudice. When prejudice is presumed, the burden shifts to the state, which must then affirmatively show either that the delay is "extenuated, as by the defendant's acquiescence," or "that the delay left [the defendant's] ability to defend himself unimpaired."'"

Ex parte Anderson, 979 So. 2d 777, 783 (Ala. 2007) (quoting Walker, 928 So. 2d at 267-68)."[W]hen an accused alleges solely that her trial was delayed because of government negligence ... courts applying Doggett generally do not presume prejudice under the fourth Barker factor unless the postindictment delay is five years or more." Walker, 928 So. 2d at 270 (citing United States v. Serna-Villarreal, 352 F. 3d 225, 232 (5th Cir. 2003)."

Further, Doggett applies and "inverse-variance" rule in which "the reviewing court's 'toleration of [governmental] negligence varies inversely with its protractedness ... and its consequent threat to the fairness of the accused's trial." Doggett, 505 U.S. at 657, 112 S. Ct. 2686. In other words, the longer the delay resulting from the state's negligence, the greater the likelihood that the accused's speedy-trial right has been violated, even without the accused affirmatively demonstrating actual prejudice.

Dennis's case falls under the third Doggett category of negligent delay. Dennis does not allege bad-faith efforts by the State to gain an unfair advantage based upon the delay. The prosecution sought, and obtained, one continuance of the trial of this case in a motion filed on May 31, 2018. But during the first six years that the case was pending the trial court never entered an order setting the case for trial, and the 2018 trial setting that the trial court continued at the State's request was the only trial setting before the final trial settings in March 2019 and in June 2019.[4] This continuance requested by the State was to conduct additional DNA testing that the State asserted could provide exculpatory evidence

[4]The State asserts that the "trial court delayed the date set for trial a total of twenty-four times. (C. 2-15; CR-18-0139 C. 29-40.)" (State's brief, p. 35.) The State's brief also indicates that there were additional trial settings. The Supplemental Record on appeal in CR-18-0139, the appeal of Dennis's petition for writ of habeas corpus, includes a case-action summary sheet with 28 entries of the case being "SET FOR: JURY TRIAL" on different dates between August 13, 2012, and December 3, 2018. If true, this would support Dennis's argument that this case involved an excessive delay with unnecessary continuances, but these entries do not appear to be entries by the circuit-court judge presiding over the case and are not supported by corresponding orders entered by the trial court and served on the parties. Many of the entries indicating that the case had been set for trial also conflict with the express statements of the trial court that the case would not be set for trial during those time periods. Thus, this Court does not consider these "jury trial" settings in determining whether Dennis was denied his right to a speedy trial.

for the defense. Yet, Dennis strenuously objected to this continuance, and the State was aware that the new DNA testing could also produce additional evidence that would potentially aid the State in obtaining a conviction in this case. Other delays were directly caused by the prosecution when the State requested a continuance of less than two weeks for a hearing date because of a conflict with another capital-murder case, and when the State failed to file a brief as ordered by the trial court, which resulted in the trial court granting the State 60 additional days to file the brief and resulted in the State filing the brief 72 days after the original due date. The State also filed a motion to continue a pretrial hearing that was denied after Dennis filed two objections to the State's motion.

The delay in Doggett, like the delay in Dennis's case, was over eight years from the time of Doggett's indictment to the time of his conditional guilty plea. Almost all the delay in Doggett was between the time that Doggett was indicted and the time that he was arrested. The government made little or no efforts to locate Doggett before his arrest. It appears that Doggett was out of the country, and not subject to being arrested on his charges, for the first two-and-a-half years of the delay. He returned

to the United States and could have been found relatively easily during the next six years before he was eventually arrested and convicted. Although the Court determined that Doggett had "failed to make any affirmative showing that the delay weakened his ability to raise specific defenses" or to prove actual prejudice suffered, Doggett held that "affirmative proof of particularized prejudice is not essential to every speedy trial claim ... [and] that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" Doggett, 505 U.S. at 655 (quoting Barker, 407 U. S. at 532). In reversing Doggett's conviction based upon a violation of his Sixth Amendment right to a speedy trial, the Supreme Court stated as follows:

> "Barker made it clear that 'different weights [are to be] assigned to different reasons' for delay. ... Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness."

Doggett, 505 U.S. at 657.

Often relying on the Supreme Court's holding in Doggett, the Alabama appellate courts have frequently addressed the issue of when prejudice should be presumed so that individuals charged with criminal offenses are relieved from proving actual prejudice. For example, in Taylor v. State, 429 So. 2d 1172 (Ala. Crim. App. 1983) a delay of four years and nine months occurred between Taylor's indictment and his trial. This delay was caused by the prosecution's negligence in returning Taylor from prison to face his new charges. This negligence resulted in additional delays after Taylor was released from prison on his other case. Once Taylor was arrested, he was tried and convicted within five months of his arrest. In determining that Taylor's right to a speedy trial had been violated by the State's unintentional, but negligent actions, this Court held that "'[s]imple bureaucratic inefficiency' must be weighted against the government. United States v. Greene, 578 F. 2d 648, 655 (5th Cir. 1978)." Taylor, 429 So. 2d at 1174. Although this Court found that Taylor had proven some actual prejudice, the Court explained that

> "where the delay is not only excessive but the result of unexcused inaction or misconduct by the Government, it is prima facie prejudicial. United States ex rel. Solomon v. Mancusi, 412 F. 2d 88, 91 (2nd Cir. 1969). In such a case all the defendant need show is a faded memory. The burden then

> shifts to the Government which must demonstrate that the defendant has not been prejudiced by the delay."

Taylor, 429 So. 2d at 1175. Likewise, in Ex parte Carrell, 565 So. 2d 104 (Ala. 1990), which involved a delay of less than three years between Carrell's indictment and trial, with no showing of actual prejudice other than a contention that Carrell's memory had "faded," this Court held that "[a]lthough ordinarily a mere assertion of a loss of memory is not enough of a showing of prejudice to support a finding that a defendant has been denied due process, where the delay is excessive and is the result of unexcused inaction by the State, the delay is prima facie prejudicial." Carrell, 565 So. 2d at 108. This Court held that the delay in Carrell "was of such a length that defendant's right to a speedy trial had been violated" and reversed and rendered Carrell's conviction. Id. at 109.

In addition to acknowledging the often insurmountable difficulty in proving prejudice, such as the difficulty in proving a loss of memory regarding an incident and the anxiety that may be caused by the pendency of criminal charges, this Court has also noted public-policy reasons for not requiring proof of actual prejudice in limited circumstances.

> "'"The reason for dispensing with the prejudice requirement entirely when the other three factors point heavily toward a violation of speedy trial is deterrence: the prosecution should not be permitted to engage in inexcusable misconduct on the hope that the defendant will not be able to make out a case of prejudice. Where such misconduct has occurred, the state cannot complain that the legitimate interests of its criminal justice system, being pursued in good faith, are being sacrificed because of an honest mistake in a case in which no ultimate harm has been done."'"

Nickerson v. State, 629 So. 2d 60, 66 (Ala. Crim. App. 1993) (quoting Turner v. Estelle, 515 F. 2d 853, 858-59 (5th Cir. 1975), cert denied, 424 U. S. 955 (1976), quoting in turn Hayes v. State, 487 So. 2d 987, 995-96 (Ala. Crim. App. 1986)). In Nickerson, the Court did not discount Nickerson's assertions regarding his loss of memory and anxiety during incarceration even though he was also serving a long prison sentence on another case. The Court in Nickerson held that

> "'"while it might be argued that a person already in prison would be less likely than others to be affected by 'anxiety and concern accompanying public accusation,' there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person at large. Cf. Klopfer v. North Carolina, supra, 386 U. S. [213] at 221-222, 87 S. Ct. [988] at 992-993 [18 L. Ed. 2d 1 (1967)] ...
>
> "'"... And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time."

> Smith [v. Hooey], 393 U. S. [374,] 378-380, 89 S. Ct. [575,] 577-78, 21 L. Ed. 2d [607,] 611-12 [(1969)].'"

Nickerson, 629 So. 2d at 66 (quoting Aaron v. State, 497 So. 2d 603, 604 (Ala. Crim. App. 1986)). The Court in Nickerson weighed these factors as part of the Barker balancing test and held that the delay of four and a half years from the defendant's trial to his retrial violated his right to a speedy trial. The feelings of "anxiety and concern" discussed in Nickerson are compounded with charges, like the one in Dennis's case, that have the ultimate punishment of death by lethal injection as a sentencing option.

This Court has addressed other factual scenarios in which the appellant established little or no actual prejudice but consideration of the other Barker factors resulted in a finding that an accused's Sixth Amendment right to a speedy trial had been violated. In Turner v. State, 378 So. 2d 1173 (Ala. Crim App. 1979), Turner was indicted for assault with intent to murder on January 11, 1977. Authorities in Alabama were aware that Turner was in custody in Georgia at the time of his indictment, and he filed an "inmates' notice of place of imprisonment and request for disposition of indictments" in May or June of 1977. This Court regarded this request as sufficient "notice" of Turner's speedy-trial

claim. Alabama officials were unfamiliar with the extradition process, and their inability to file the proper paperwork caused a delay in returning Turner to Alabama for disposition of his case until January 25, 1979. Turner then filed a motion to quash his indictment for failure to grant him a speedy trial. This motion was denied by the trial court. Turner was tried and convicted of assault with intent to murder within two months of his return to Alabama. Although "[t]he record [was] silent with regards to whether [the] appellant was prejudiced by the excessive delay [of 25 months] in bringing him to trial, ... [this Court held] 'that where the other three Barker factors weigh in favor of the accused, "prejudice either actual or presumed becomes totally irrelevant."' Prince v. State, [354 So. 2d 1186, 1192 (Ala. Crim. App. 1977), cert. denied 354 So. 2d 1193 (Ala. 1978),] quoting Hoskins v. Wainwright, 485 F. 2d 1186, 1192 (5th Cir. 1973)." Turner, 378 So. 2d at 1179. With a delay less than one-third as long as the delay in Dennis's case, the Court reversed Turner's conviction because his Sixth Amendment right to a speedy trial was violated.

Although the State did not act with "reasonable diligence" at all times in bringing Dennis's case to trial, approximately one and a half

years of the delay was directly attributable to the actual negligence of the prosecution. The remainder of the delay, beyond the time normally required to take a capital-murder case to trial, was caused by inaction of the trial court. Yet, the prosecution, unlike Dennis, did not make any efforts to encourage the circuit-court judge who presided over this case before trial to dispose of the case in a timely manner. It is well established that "[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." Barker, 407 U.S. at 527. "[C]ontinuances that are in the discretion of the trial judge and delay occasioned by want of time to try a case do not contravene the right to a speedy trial. Baggett v. State, 45 Ala. App. 320, 229 So. 2d 819 (1969)." Wooden v. State, 822 So. 2d 455, 457 (Ala. Crim. App. 2000). Furthermore, this Court has held that a delay caused by a "full" docket should "be weighed against the State, although less heavily than an intentional delay. Barker, supra, 407 U.S. at 531, 92 S. Ct. at 2192." Goodson v. State, 539 So. 2d 1112, 1114 (Ala. Crim. App. 1988). Although some reasons were given for the trial court's delay in bringing this case to trial, such as a docket with multiple capital-murder trials, an eight-year delay cannot be excused

under the circumstances of this case. Details of the trial court's docket are not clear, but Dennis points out that approximately two months before Dennis's trial he was the "longest serving inmate in the Houston County Jail" and that only one other inmate in the Houston County jail had been in custody more than four years, while Dennis had been in the jail, following extradition, more than seven years. (Dennis's brief, p. 32; Dennis's Exhibit 14.) The delay occasioned by the trial court's failure to set the case for trial clearly weighs against the State.

Although the State correctly points out that this Court has upheld other convictions that included the same or longer delays than the 8-year (97-month) delay that occurred in this case, those cases are distinguishable from Dennis's case. In Lawson v. State, 954 So. 2d 1127 (Ala. Crim. App. 2006), this Court has held that a 10-year delay between the defendant's arrest and his conviction for robbery did not warrant dismissal of his conviction when the defendant did not show that he was actually prejudiced by the delay. But this Court weighed against Lawson that he had failed to appear for two trial settings in the case only a few months after his arrest and that he did not assert his right to a speedy trial until 10 years after his arrest and less than a month before the final

trial setting when the case was resolved. Lawson, 954 So. 2d at 1135. Likewise, in Wilson v. State, 329 So. 3d 71 (Ala. Crim. App. 2020), this Court affirmed Wilson's convictions for burglary and theft of property following a 97-month delay from the time of Wilson's arrest to the time of his convictions. Yet Wilson had failed to appear for a trial date a few months after his arrest and he "did not assert his right to a speedy trial on those charges until more than seven years" after he became aware of the charges and only six months before the final resolution of his case. Thus, this Court held that "Wilson was not entitled to a presumption of prejudice and that he therefore had the burden of demonstrating actual prejudice to prevail on this speedy-trial claim." Id. at 81.

In this case, the delay of over eight years was excessive. Although Dennis did not object to a one-month continuance of a hearing in August 2015, he did not agree to continue any trial setting and he expressly stated that he was not waiving his right to a speedy trial when he did not object to the State's request that the hearing being continued. (C. 498.) After being notified by the trial court that a delay in setting a trial date was necessary, Dennis asserted his right to a speedy trial, and he continued to assert this right. Other than the delay associated with the

resolution of Dennis's motion to suppress, which could have been handled within a year of the motion being filed, without delaying the original 2014 or 2015 estimated trial dates, Dennis was not responsible for any of the delay in this case. Although this case involved a capital-murder charge, there were no continuances or delays associated with obtaining experts for the guilt phase or the penalty phase of the trial. Considering all the aforementioned factors, this Court finds that the first three Barker factors weigh heavily in favor of Dennis so that prejudice should be presumed in this case. As outlined above, Dennis was unable to establish substantial actual prejudice, but he did establish that numerous witnesses had died before his case went to trial. As this Court held in reversing an accused's conviction on speedy-trial grounds after a delay of three years and eight and one-half months,

> "[i]t would be speculation on our part to guess the content of the above witnesses' testimony, and further speculation as to whether such would be beneficial to the defendant's defense. 'But we can know that the search for truth has been severely hampered and that, on this and other aspects, [the] defendant has demonstrated "the likelihood, or at least reasonable possibility, that (he) has been prejudiced."'"

Vickery v. State, 408 So. 2d 182, 186 (Ala. Crim. App. 1981) (citations omitted). He also asserted that he suffered from "anxiety and concern"

over the pending charges and that he had served almost eight years in the Houston County Jail. When the first three factors weigh heavily in favor of an accused, as they do here, this Court has held that "'prejudice either actual or presumed becomes totally irrelevant.'" Prince v. State, 354 So. 2d 1186, 1192 (Ala. Crim. App. 1977) (quoting Hoskins v. Wainwright, 485 F. 2d 1186, 1192 (5th Cir. 1973)). We have also held that "upon a finding of presumed prejudice, 'the burden shifts to the State, which must then affirmatively show that the delay is "extenuated, as by the defendant's acquiescence," or "that the delay left [the defendant's] ability to defend himself unimpaired."'" State v. White, 962 So. 2d 897, 904 (Ala. Crim. App. 2006) (quoting Doggett, 506 U.S. at 658 n. 4). Just as an accused has a difficult burden in establishing actual prejudice, the State has an even heavier burden when attempting to establish a lack of prejudice. Here, the State has not established that Dennis was not prejudiced by the delay. Witnesses who passed away, memories that have faded, the anxiety of knowing for over eight years that the death penalty could be imposed, and possible differences in the degree of confinement in the Houston County jail versus a Virginia prison are asserted prejudices that have not been refuted by the State.

This Court's consideration of the Barker factors leads to the conclusion that Dennis was entitled to relief on his speedy-trial claim and the trial court erred in denying his motion to dismiss. Accordingly, the judgment of the circuit court is reversed and a judgment rendered for Dennis, the sentence is vacated, and the indictment is dismissed with prejudice.

REVERSED AND JUDGMENT RENDERED.

Windom, P.J., and Kellum, McCool, and Minor, JJ., concur in the result.